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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 MARYGRACE A. CONEFF, *et al.*,)
9 Plaintiffs,) CASE NO. C06-944 RSM
10 v.) ORDER DENYING DEFENDANTS'
11 AT&T CORP. *et al.*,) MOTION TO COMPEL ARBITRATION
12 Defendants.)
13

14 **I. INTRODUCTION**

15 This matter comes before the Court on “Defendants’ Amended Motion to Compel
16 Arbitration Pursuant to the Federal Arbitration Act and to Dismiss Action.” (Dkt. #133).
17 Defendants argue that pursuant to a binding arbitration clause entered into between the
18 parties, Plaintiffs must pursue their disputes through individualized arbitration. Defendants
19 also argue that the Federal Arbitration Act preempts any state law defenses Plaintiffs can
20 bring to the enforceability of the arbitration clause.

21 Plaintiffs respond that the arbitration provisions are unenforceable because they are
22 substantively unconscionable. Additionally, Plaintiffs indicate that Defendants’ preemption
23 arguments have been rejected by the Ninth Circuit.

24 For the reasons set forth below, the Court agrees with Plaintiffs, and DENIES
25 Defendants’ motion to compel.
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II. DISCUSSION

A. Background

The instant putative class action lawsuit was brought by several individuals across the United States against Defendants Cingular Wireless LLC (“Cingular”), Cingular Wireless Corporation, AT&T Wireless Services, Inc. (“AT&T Wireless”), and New Cingular Wireless Services, Inc. (*See* Dkt. #45, Second Am. Compl., ¶¶ 22-25). Plaintiffs, who were or are currently AT&T Wireless customers, allege that after Cingular merged with AT&T Wireless in October of 2004, Cingular deliberately degraded AT&T Wireless’ network in order to induce AT&T Wireless customers to transfer their plans to Cingular plans, which they allege are generally more expensive and less favorable to customers. Plaintiffs also contend that Cingular’s intention was to charge AT&T Wireless customers with various fees and costs in connection with those new plans.

Plaintiffs allege that Cingular’s specific scheme was to encourage AT&T Wireless customers to “upgrade” to Cingular’s network. These “upgrades” required customers to do one or more of the following: (1) pay an \$18 transfer fee to Cingular; (2) purchase one or more new phones from Cingular; (3) pay \$18 for a SIM chip to operate their current phone; and/or (4) enter into a new service contract with Cingular. Plaintiffs allege that AT&T Wireless customers who did not agree to such an “upgrade” were left with a choice to either fulfill their contract term with a degraded AT&T Wireless service, or pay a \$175 early termination fee to cancel service.

Plaintiffs also allege that Cingular began charging an unnecessary and mandatory fee to all AT&T Wireless customers. As a condition for approval of the merger, the Federal Communication Commission required Cingular to keep AT&T Wireless’ network in place until February of 2008. Significantly, Cingular offered its wireless services through a new and improved GSM network, whereas AT&T Wireless offered service through a TDMA/Analog network. Plaintiffs allege, however, that in July of 2006, Cingular began imposing a mandatory \$4.99 monthly fee to any AT&T Wireless customer still using the TDMA/Analog network. Plaintiffs note in their complaint that major publications, including

1 the Wall Street Journal, reported that Cingular had “been spending next to nothing to maintain
2 the [AT&T Wireless] network, leaving customers who don’t upgrade [to the Cingular
3 network] in the lurch.” (Second Am. Compl., ¶ 35).

4 As a result of this conduct, Plaintiffs initiated the instant class action against Defendants
5 in this Court on July 6, 2006. Plaintiffs assert claims under the consumer protection acts of 14
6 different states, the Federal Communications Act as codified by 47 U.S.C. §§ 201 *et seq.*, and
7 several common-law doctrines. Plaintiffs also seek, among other things, a declaratory
8 judgment that an arbitration provision contained in their contracts with Defendants is
9 unconscionable and therefore unenforceable.

10 Defendants now bring the instant motion to compel arbitration on an individual basis,
11 and to dismiss Plaintiffs’ claims pursuant to the arbitration provision that Plaintiffs argue is
12 unconscionable.¹ Although the exact wording of the various AT&T Wireless Service
13 Agreements (“WSAs”) that Plaintiffs entered into with Defendants has changed over time, the
14 arbitration agreements have remained substantially intact. Each expressly requires customers
15 to pursue their dispute in either individual arbitration or small claims court. The WSAs also
16 preclude customers from bringing or participating in any class action, regardless of whether
17 the action is brought in arbitration or in court. Counsel for Plaintiffs acknowledged during
18 oral argument that the 2006 WSA controls in this case. This version of the WSA provides:

19 YOU AND [CINGULAR/AT&T] AGREE THAT EACH MAY BRING CLAIMS
20 AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND
21 NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR
22 REPRESENTATIVE PROCEEDING. Further, unless both you and [Cingular/AT&T]
23 agree otherwise, the arbitrator may not consolidate more than one person’s claims, and
24 may not otherwise preside over any form of a representative or class proceeding.

25 (Dkt. #52, Decl. of Berinhout, Ex. 4 at 35; Dkt. #134, Ex. 23 at 124).

26 Defendants also contend that each WSA contains a choice-of-law clause selecting the
27 Plaintiff’s home state as the governing law. Defendants argue that under the law of each
28 applicable state, the class-waiver provisions in the WSAs are neither procedurally nor

¹ It is noteworthy that Defendants’ original motion to compel was filed on October 30, 2006.
(Dkt. #51). However, due to extensive discovery and repeated continuances requested by the
parties, the motion finally became ripe for review on March 11, 2009.

1 substantively unconscionable. The applicable state laws include: Alabama, Arizona,
2 California, Florida, Illinois, Missouri, New Jersey, Virginia and Washington.

3 Alternatively, Defendants argue the Section 2 of the FAA preempts Plaintiffs' state-law
4 unconscionability arguments. Defendants suggest that the FAA preempts general principles
5 of contract law such as unconscionability if those doctrines are employed in ways that subject
6 arbitration clauses to special scrutiny. Given the unique and "pro-consumer" nature of the
7 arbitration agreements at-issue, Defendants contend that the Court should overlook any state-
8 law standard that is at odds with the FAA's liberal policy in favor of arbitration.

9 Notably, and prior to the merger, Cingular was the second largest provider of wireless
10 communication services in the U.S. in terms of subscribership with approximately 24 million
11 customers, and AT&T was the third largest with over 22 million customers. After the merger,
12 in which Cingular acquired AT&T Wireless for \$41 billion, the new consolidated corporation
13 branded as AT&T Mobility became the largest provider of wireless services. At the end of
14 2007, AT&T Mobility had over 70 million customers and reported approximately \$42.7
15 billion in revenue. (Dkt. #138, Decl. of Coluccio, Ex. Q).

16 **B. The Federal Arbitration Act**

17 It is well settled that Congress enacted the Federal Arbitration Act ("FAA") to
18 "overcome judicial resistance to arbitration . . . and to declare a national policy favoring
19 arbitration of claims that parties contract to settle in that matter." *Vaden v. Discover Bank*,
20 129 S.Ct., 1262, 1271 (2009) (internal quotations and citations omitted). The primary
21 purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according
22 to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489
23 U.S. 468, 479, (1989). The FAA clearly manifests a liberal federal policy favoring
24 arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991).

25 Nevertheless, courts should consider "ordinary state-law principles that govern the
26 formation of contracts" in determining whether the arbitration provision is valid. *First*
27 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citations omitted). Thus,
28 "generally applicable contract defenses such as fraud, duress, or unconscionability, may be

1 applied to invalidate arbitration agreements[.]” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S.
2 681, 687 (1996) (citations omitted). The party opposing arbitration bears the burden of
3 showing that the agreement is not enforceable. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531
4 U.S. 79, 91-92 (2000).

5 Here, the parties do not dispute that Plaintiffs’ claims fall within the scope of the
6 arbitration agreements in the WSAs. As a result, the Court must determine whether the
7 arbitration agreements are enforceable.

8 **C. Applicable Law**

9 The first issue for the Court to determine is whether the choice-of-law provisions
10 contained in the WSAs are valid. It is undisputed that the WSAs select the law of the
11 individually-named Plaintiff’s home state or the state of the wireless phone number. (Dkt.
12 #133 at 19, n.8). Plaintiffs maintain, however, that applying the choice-of-law clauses would
13 violate Washington’s fundamental public policy against class-action waivers in arbitration
14 agreements.

15 A court sitting in diversity, as is the case here, applies the choice-of-law rules of the
16 forum state. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001). In
17 Washington, “there must be an actual conflict between the laws or interests of Washington
18 and the laws or interests of another state before Washington courts will engage in a conflict of
19 laws analysis.” *Erwin v. Cotter Health Centers*, 161 Wash.2d 676, 692 (2007) (citations
20 omitted). Consequently, and as this district court has noted, choosing the applicable law is a
21 two-part inquiry: first, a court must determine whether there is an actual and meaningful
22 difference between the potentially applicable laws; and second, a court must determine
23 whether the parties’ choice-of-law is actually effective. *Carideo v. Dell, Inc.*, 520 F.Supp.2d
24 1241, 1244-45 (W.D. Wash. 2007).

25 With respect to the first inquiry, there is no question that an actual conflict exists
26 between Washington law and the law of other states that are implicated in this lawsuit. In
27 Washington, a class-action waiver is unenforceable in certain circumstances. *Scott v.*
28 *Cingular Wireless*, 160 Wash.2d 843, 859 (2008). On the other hand, in Virginia, Illinois,

1 and Alabama – three states that are potentially applicable in the instant case – courts have
2 upheld class action waivers based on a strict interpretation of the FAA, or when the corporate
3 defendants have agreed to pay the administrative fees associated with arbitration. *See, e.g.,*
4 *Gay v. CreditInform*, 511 F.3d 369, 390-92 (3d Cir. 2007) (applying Virginia law);
5 *Hutcherson v. Sears Roebuck & Co.*, 342 Ill.App. 3d 109, 121-124 (2003) (applying Illinois
6 law); *Billups v. Bankfirst*, 294 F.Supp.2d 1265, 1276-77, n. 6 (M.D. Ala. 2003) (applying
7 Alabama law). Indeed, there is a split of authority in this country over the enforceability of
8 class-action waivers. *See Scott*, 160 Wash.2d at 850-851 (collecting cases).

9 As a result, the Court must ask whether the parties’ express contractual choice-of-law is
10 effective. Washington applies § 187 of the *Restatement* to make this determination. *See*
11 *Erwin*, 161 Wash.2d at 694. Section 187(2) of the *Restatement* specifically provides:

- 12 (2) The law of the state chosen by the parties to govern their contractual rights and
13 duties will be applied, even if the particular issue is one which the parties could
14 not have resolved by an explicit provision in their agreement directed to that
15 issue, unless either
16 (a) the chosen state has no substantial relationship to the parties or the
17 transaction and there is no other reasonable basis for the parties’ choice, or
18 (b) application of the law of the chosen state would be contrary to a fundamental
19 policy of a state which has a materially greater interest than the chosen state
20 in the determination of the particular issue and which, under the rule § 188,
21 would be the state of the applicable law in the absence of an effective choice
22 of law by the parties.

23 *Restatement (Second) of Conflict of Laws* § 187 (1971).

24 Here, there is no dispute that Defendants’ chosen state has a substantial relationship to
25 the parties of the transaction. The states are those in which the individually named Plaintiffs
26 respectively reside. Therefore Plaintiffs must show that the elements of § 187(2)(b) of the
27 *Restatement* are met.

28 1. Washington Law Governs Absent an Enforceable Choice-of-Law Clause

As the Washington Supreme Court recently explained, the first inquiry in the choice-of-
law analysis is to determine whether Washington law would apply without the provision.
McKee v. AT&T Corp., 164 Wash.2d 372, 384 (2008). Washington courts have applied
various tests when making this inquiry, including the “most significant relationship” test from

1 § 188 of the *Restatement*. This test specifies that courts should consider: (1) the place of
2 contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the
3 location of the subject matter of the contract, and (5) the domicile, residence, or place of
4 incorporation of the parties. *Restatement, supra*, § 188; *see also Mulcahy v. Farmers Ins. Co.*
5 *of Washington*, 152 Wash.2d 92, 101 (2004) (employing the same five factors).

6 Other courts have examined factors outside of those listed in the *Restatement*. For
7 example, this district court held that in a class-action lawsuit involving plaintiffs from across
8 the nation, “the place of injury is of lower importance . . . In such a case, the state in which
9 *the fraudulent conduct arises* has a stronger relationship to the action.” *Kelley v. Microsoft*
10 *Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008) (emphasis added). Likewise, a Washington
11 state court acknowledged that even though a defendant corporation was incorporated outside
12 of Washington state, Washington law nevertheless applied because “all defendants reside or
13 conduct business in Washington . . . a Seattle attorney was involved in preparing and
14 reviewing many transaction documents . . . and [] many of the acts of alleged fraud occurred
15 in Washington.” *Ito Intern. Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 290 (1996).

16 In the instant case, the Court finds that the first four factors in the *Restatement* analysis
17 are neutral. The reality of the situation presented by this case is that there is simply no place
18 of contracting, no place of negotiation of the contract, no place of performance, and no central
19 location of the subject matter of the contract. Instead, Defendants sent the WSAs to
20 customers who were existing AT&T Wireless customers, and there is no evidence that the
21 Plaintiffs repeatedly communicated with Defendants to either change or otherwise modify
22 their plans. Therefore no true negotiation between the parties took place. Additionally, in a
23 case involving wireless phones, there is no central place of performance, as Defendants
24 undoubtedly have satellite towers all across the country, and customers often use their phones
25 in multiple states. Indeed, wireless phone use is a nation-wide practice.

26 With respect to the last factor, this weighs in favor of applying Washington law.
27 Defendants concede that AT&T Wireless is a Washington corporation, and Plaintiffs also
28 allege that Washington was the primary residence of AT&T Wireless’ officers, directors, and

1 legal department. (Dkt. #136 at 19). Defendants do not dispute these contentions. In
2 addition, at least one named Plaintiff of the putative class is a Washington resident.

3 Moreover, when considering that AT&T Wireless has strong connections to this state,
4 application of Washington law is the logical choice. Plaintiffs indicate that the AT&T
5 Wireless executives responsible for “designing, implementing, and operating [AT&T
6 Wireless’] national network, including network footprint expansion plans, capacity path
7 growth, and the deployment strategy for the company’s next generation wireless network”
8 were located in Redmond, Washington. (Decl. of Coluccio, Ex. CC). Plaintiffs further
9 indicate that the AT&T Wireless executives responsible for “marketing strategy and
10 programs, including products and offers, advertising and marketing communications,
11 partnerships and direct marketing” were also located in Redmond. (*Id.*, Ex. DD). In addition,
12 AT&T Wireless’ legal department was located in Washington, and it appears that the initial
13 drafts of the arbitration provisions were drafted here. (*Id.*, Ex. L, Dep. of Berinhout, 105:17-
14 22; 111:17-113:1). Defendants also do not dispute these contentions.

15 Nevertheless, counsel for Defendants indicated at oral argument that an unpublished
16 Ninth Circuit case is controlling on this issue. *See In re Detwiler*, 305 Fed.Appx. 353 (9th
17 Cir. 2008). In that case, a customer to a telecommunications provider argued that the district
18 court erred in holding that Florida law applied if no choice-of-law clause existed in the
19 parties’ contract. The Ninth Circuit affirmed the district court’s decision because the majority
20 of the *Restatement* factors weighed against the customer, who was seeking to apply
21 Washington law. The Ninth Circuit held that Washington law would not apply because
22 “Florida is the place of contracting, the place of negotiation, the place of performance, the
23 location of the subject matter, and the residence of one of the parties.” *Id.* at 355.
24 Significantly, the customer had contact with the telecommunications provider 11 times over a
25 period of six years, and had received several guides regarding her agreement.

26 The Court finds that *Detwiler* is not controlling. As explained previously, the Plaintiffs
27 in this case did not have extensive contacts or negotiations with the Defendants, and the first
28 four factors of the *Restatement* simply have no compelling effect. Conversely, the only factor

1 that clearly applies weighs in favor of applying Washington law. Ultimately, the Court agrees
2 with Plaintiffs’ counsel’s characterization during oral argument that Washington’s choice-of-
3 law analysis is a “messy test.” It is clear that Washington courts examine various factors in
4 determining whether Washington law would apply.

5 As a result, and similar to the *Kelley* and *Prescott* cases above, it is clear that a
6 substantial portion of the allegedly fraudulent activity occurred in Washington. The
7 application of Washington law in this case “would encourage Washington residents involved
8 in business transactions to behave responsibly.” *Prescott*, 83 Wn. App. at 290. Coupled with
9 the fact that the *Restatement* analysis weighs slightly in favor of applying Washington law,
10 the Court finds that Washington has the most significant relationship to this case, and that
11 Washington law would apply absent a choice-of-law provision in the WSAs.

12 2. Fundamental Public Policy of Washington

13 There can be no doubt that Washington has a strong public policy of refusing to enforce
14 exculpatory class action bans. *See Scott*, 160 Wash.2d at 859.² This policy has been
15 reinforced by *McKee*, wherein the court stated that Washington has a “fundamental public
16 policy to protect consumers through the availability of class action.” *McKee*, 164 Wash.2d at
17 385. The *McKee* court further stated that “Washington’s strong [CPA] policy favoring class
18 adjudication of small-dollar claims is a ‘fundamental policy’ contemplated by [the
19 *Restatement*].” *Id.* at 386.

20 Here, there is no doubt that the claims alleged by Plaintiffs implicate a fundamental
21 public policy of Washington. A prohibition on the Plaintiffs’ ability to initiate a class-action
22 lawsuit would violate the rights protected by the Washington CPA and the case law that has
23 interpreted these rights. Furthermore, and as mentioned above, there exists the possibility that
24 in at least three of the jurisdictions that Defendants contend apply in this case, a court may

25 ² In *Carideo*, this district court found that the analysis of whether a contract would violate a
26 fundamental public policy is similar to whether it would be substantively unconscionable.
27 520 F.Supp.2d at 1245. However, the *McKee* court found that “[t]his question is different
28 than determining whether a class action ban under some circumstances is substantively
unconscionable.” 164 Wash.2d at 385. The Ninth Circuit remanded the *Carideo* decision in
light of *McKee*. Accordingly, the Court separates the analysis as well.

1 uphold class-action waivers under certain circumstances. *See Gay*, 511 F.3d at 392;
2 *Hutcherson*, 342 Ill.App. 3d at 121-124; *Billups*, 294 F.Supp.2d at 1276-77, n. 6. Therefore
3 the Court finds that this element of § 187 of the *Restatement* has been met.

4 3. Washington's Materially Greater Interest

5 The last factor for this Court to consider is whether Washington has a materially greater
6 interest in adjudicating this dispute than the other potentially applicable states. The Court has
7 effectively already performed this analysis in its discussions above. There can be no doubt
8 that Washington has an interest in regulating the conduct of businesses that reside in this state.
9 This interest is materially greater than the interests of the eight other states whose laws
10 Defendants contend apply in this case. In those states, the only connection to this lawsuit is
11 that the individually-named Plaintiffs reside there. Defendants do not conduct any significant
12 business activity in such states, and therefore the states have limited interest in adjudicating
13 the case at bar.

14 As a result, because the elements of § 187(2) have been met, Washington law shall
15 apply in this case.

16 **D. Unconscionability**

17 Washington law recognizes two types of unconscionability, substantive and procedural.
18 *Zuvver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 303 (2004) (citations omitted).
19 “Substantive unconscionability involves those cases where a clause or term in the contract is
20 alleged to be one-sided or overly harsh, while procedural unconscionability relates to
21 impropriety during the process of forming a contract.” *Schroeder v. Fageol Motors, Inc.*, 86
22 Wash.2d 256, 260 (1975) (citation omitted). In Washington, courts may hold that contracts
23 are unenforceable based upon substantive unconscionability only. *See Scott*, 160 Wash.2d at
24 854, n.4 (“Because we find the class action waiver substantively unconscionable, we find it
25 unnecessary to address plaintiffs’ claims of procedural unconscionability.”).

1 1. Substantive Unconscionability in Washington

2 Both parties are fully aware that the Washington Supreme Court has recently held that a
3 class-action waiver provision in an arbitration agreement is substantively unconscionable.
4 *See Scott*, 160 Wash.2d at 859. Other recent decisions involving class-action waivers and
5 applying Washington law have found similarly. *See Lowden v. T-Mobile USA, Inc.*, 512 F.3d
6 1213, 1219 (9th Cir. 2008); *Luna v. Household Finance Corp. III*, 236 F.Supp.2d 1166, 1179
7 (W.D. Wash. 2002); *Riensch v. Cingular Wireless, LLC*, 2006 WL 3827477, *12 (W.D.
8 Wash. 2006).

9 Despite this recent case law, Defendants contend that there is no categorical rule that all
10 class-action waivers contained in arbitration provisions are substantively unconscionable.
11 Defendants argue that *Scott* only bans class-action waivers where such a waiver would
12 prevent vindication of consumer rights secured by the Washington CPA. Defendants further
13 point out that the court in *Scott* held that it could “certainly conceive of situations where a
14 class action waiver would not prevent a consumer from vindicating his or her substantive
15 rights under the CPA and would thus be enforceable.” *Scott*, 160 Wash.2d at 860, n.7.

16 The Court agrees that there is no *per se* ban on a class-action waiver. As this district
17 court has previously held, “*Scott* requires the court to examine the enforceability of a class-
18 action waiver given the totality of the circumstances.” *Carideo*, 520 F.Supp.2d at 1243. As a
19 result, the heart of this dispute is whether the specific terms of the class-action waivers are
20 substantively unconscionable.

21 2. Cingular and AT&T’s class-action waiver provisions

22 Defendants contend that there are several aspects of the applicable arbitration
23 provisions in the WSAs that make them uniquely “pro-consumer,” and therefore enforceable.
24 These features include, among other things, the following incentives: (1) cost-free arbitration
25 wherein Defendants agree to pay all filing, administration, and arbitrator fees; (2) the option
26 to bring a claim in small claims court; (3) the availability of punitive damages; (4) a
27 guaranteed minimum recovery of at least \$5,000 under certain conditions; and (5) the
28

1 availability of double attorneys' fees under certain conditions while Defendants
2 simultaneously disclaim their right to seek attorneys' fees. (Dkt. #133 at 16-17).

3 Defendants' expert witness Richard A. Nagareda, a law professor at Vanderbilt
4 University, also testifies that he has "never seen an arbitration provision that has gone as far
5 as this one to provide incentives for consumers and their prospective attorneys to bring
6 claims." (Dkt. #53, Decl. of Nagareda, ¶ 11). Mr. Nagareda continues that the applicable
7 arbitration provision "reduces dramatically the cost barriers to the bringing of individual
8 consumer claims . . . and provides financial incentives for consumers (and their attorneys, if
9 any) to pursue arbitration in the event that they are dissatisfied with whatever offer Cingular
10 has made to settle their disputes." (*Id.*).

11 Notwithstanding these arguments and the allegedly unique and "pro-consumer" nature
12 of the agreements between AT&T and Cingular and their customers, the Court finds that the
13 class-waiver provisions are substantively unconscionable for the following five reasons.

14 First, the class-action waiver serves to protect Defendants "from legal liability for any
15 wrong where the cost of pursuit outweighs the potential amount of recovery." *Scott*, 160
16 Wash.2d at 855. Here, there can be no doubt that the purported class in this case alleges
17 injuries that consist of small sums of money. Specifically, Plaintiffs' second amended
18 complaint describes the putative class members' damages as ranging from \$4.99 to \$175.
19 (Second Am. Compl., ¶¶ 7-21). Such small claims are undoubtedly dwarfed by the legal
20 complexity presented by the facts alleged in Plaintiffs' complaint. These include claims that
21 Cingular, a multi-billion dollar corporation, intentionally degraded AT&T's pre-existing
22 wireless network in order to exponentially increase their profits by assigning small fees to
23 customers switching to the new network. There can be no question that the cost of pursuit
24 would be prohibitively expensive for a customer proceeding on an individual basis.

25 Furthermore, Plaintiffs submit the declarations of several consumer lawyers across the
26 country, all of whom testify "that the relatively small amount in controversy makes cases
27 against large corporations such as AT&T impractical to pursue on an individual basis." (Dkt.
28 #136 at 10). Each consumer lawyer additionally testifies that he or she would not represent

1 the named Plaintiffs in individual actions, either in court or in arbitration. (*Id.*). The Court
2 finds the testimony of North Carolina lawyer Jerome Hartzell particularly compelling. He
3 states that “the hourly charge would generally or invariably exceed the entire amount in
4 controversy.” (Dkt. #43, Decl. of Hartzell, ¶ 23). “[N]o lawyer concerned with *ethical*
5 *propriety* would be comfortable charging a client by the hour for such services.” (*Id.* at ¶ 34)
6 (emphasis added).

7 Given the significant disparity presented by the facts of this case, the Court finds it clear
8 that the cost of pursuit significantly outweighs the potential recovery if each of the Plaintiffs
9 was to proceed on an individual basis. Indeed, “[t]he *realistic* alternative to a class action is
10 not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for
11 \$30.” *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in
12 original) (J. Posner).

13 The second reason in support of a finding of substantive unconscionability is that
14 Defendants significantly overstate the “premiums” contained in their WSAs. The Court gives
15 no weight to the fact that Defendants will pay for arbitration fees as well as attorneys’ fees in
16 the event a customer wishes to pursue individual arbitration. As *Scott* clearly held, “[s]hifting
17 the cost of arbitration to Cingular does not seem likely to make it worth the time, energy, and
18 stress to pursue such individually small claims.” *Scott*, 160 Wash.2d at 855-56; *see also*
19 *McKee v. AT&T Corp.*, 164 Wash.2d at 398 (“The agreement allows for small claims court
20 action, but even the availability of small claims court or low-cost arbitration does not make it
21 practicable for an individual to pursue such small amounts.”).

22 In addition, Defendants also overstate the provision in their WSAs that allow consumers
23 to potentially recoup a \$5,000 award. Defendants repeatedly argue throughout their briefings
24 that this \$5,000 minimum payment is clearly a meaningful recovery that would turn the
25 concept of unconscionability on its head. However, the \$5,000 payment is awarded *only upon*
26 *the condition* that “the arbitrator awards the customer more than [AT&T Mobility’s] last
27 written settlement offer before an arbitrator was selected.” (Dkt. #133 at 16) (internal
28 quotations omitted). Therefore the award is not guaranteed. Defendants are in full control of

1 ensuring that such an amount is never awarded by offering a settlement offer that is
2 significantly lower than \$5,000, but remains significantly higher than the nominal claims that
3 the individuals are bringing in this case. This reasoning applies with equal force to the
4 provision in Defendants' WSAs that awards double attorneys' fees should this condition
5 occur. As a result, and as the *Scott* court pointed out, while these "premiums" are laudable,
6 "it appears . . . that these provisions do not ensure that a remedy is practically available." *See*
7 *Scott*, 160 Wash. 2d at 856.

8 Third, and perhaps most compelling, is that the Court has tangible evidence which
9 reveals that Defendants' "pro-consumer" provisions are not having their intended effect. For
10 example, Plaintiffs indicate that since 2003, fewer than 200 consumer arbitrations involving
11 Defendants have been conducted nationwide, and only 265 small claims court cases have
12 been filed against Defendants nationwide. (Dkt. #136 at 33). To place this in perspective, it
13 is worthwhile to reiterate that Defendants' client base is currently over 70 million customers.
14 Therefore the actual percentage of customers utilizing Defendants' allegedly "pro-consumer"
15 provisions represents an infinitesimal amount.³

16 Plaintiffs further point out that the Foundation for Taxpayer and Consumer Rights – a
17 non-profit consumer advocacy organization – received more than 4,700 complaints regarding
18 service after the merger, and over 1,800 web-based complaints within 24 hours of the press
19 announcement that followed the filing of this class action lawsuit. (Dkt. #144, Decl. of
20 Heller, ¶¶ 8, 11). Thus, the miniscule amount of customers pursuing arbitration proves that
21 the customers are either unaware of their right to take advantage of these "pro-consumer"
22 provisions, or the customers have no incentive to bring their claims against Defendants given
23 the prohibitively expensive costs of individual adjudication. In either circumstance,
24 Defendants are utilizing the provisions in the WSAs to effectively exculpate themselves from
25 any potential liability for unfair or deceptive acts or practices in commerce, conduct that is
26 expressly barred by the Washington Supreme Court. *Scott*, 160 Wash.2d at 854 ("Contract

27
28 ³ Defendants report that they have conducted nearly 270 arbitrations. Regardless, the tiny
fraction of those pursuing individual arbitration remains essentially the same.

provisions that exculpate the author for wrongdoing, especially intentional wrongdoing, undermine the public good.”). This Court will not condone such a broad and exculpatory practice.

Relatedly, and in light of *Scott*’s holding that not all class-waivers are *per se* unconscionable, Defendants’ consistently challenged Plaintiffs during oral argument to imagine an arbitration provision that would not violate substantive unconscionability. No such burden exists. Plaintiffs must only show that the WSAs in this case are shielding Defendants from a substantial amount of potential liability. Defendants attempts to focus this Court’s attention on the “pro-consumer” provisions of the WSAs are not persuasive.

The fourth reason in support of a finding of substantive unconscionability is that class action lawsuits are necessary and effective avenues for consumers whose economic positions vis-à-vis their corporate opponents would not allow them to proceed on a case-by-case basis. Washington clearly has “a state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice.” *Scott*, 160 Wash.2d at 851. “[A] class-based remedy is the only effective method to vindicate the public’s rights.” *Id.* at 852.

Nevertheless, Defendants contend that class action settlements are often worth nothing to individuals, given that the actual award to individuals is nominal. However, the actual award to the individuals that comprise a class is only one of the principal aims of a class action lawsuit. Another primary purpose of a class action lawsuit is to allow “[p]rivate citizens [to act] as private attorneys general in protecting the public’s interest against unfair and deceptive acts and practices in trade and commerce.” *Scott*, 160 Wash.2d at 853 (citing *Lightfoot v. MacDonald*, 86 Wash.2d 331, 335-36 (1976)). Curbing fraudulent business practices is a fundamental principle of any class action lawsuit. As the *Scott* court noted when citing a California Supreme Court decision:

Individual actions by each of the defrauded consumers [are] often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; *thus an unscrupulous seller retains the benefits of its wrongful conduct.* A class action by consumers produces several salutary by-products, *including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to*

1 the judicial process of the burden of multiple litigation involving identical claims. The
2 benefit to the parties and the courts would, in many circumstances, be substantial.

3 *Scott*, 160 Wash.2d at 852 (citing *Vazquez v. Superior Court of San Jouquin County*, 4 Cal. 3d
4 800, 808 (1971)) (emphasis added).

5 Lastly, the Court recognizes that recent jurisprudence views class-action waivers
6 unfavorably. Dating back to the beginning of 2008, there have been at least seven different
7 courts in five different jurisdictions that have refused to enforce class-action waivers. *See*
8 *Hoffman v. Citibank (South Dakota)*, N.A., 546 F.3d 1078, (9th Cir. 2008); *In re Apple &*
9 *AT&T Antitrust Litig.*, 596 F.Supp.2d 1288 (N.D. Cal. 2008); *In re American Express*
10 *Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009); *McKee v. AT&T Corp.*, 164 Wash.2d 372
11 (2008); *Olson v. The Bon, Inc.*, 144 Wn. App. 627 (2008); *Fiser v. Dell Comp. Corp.*, 144
12 N.M. 464 (2008); *Woods v. QC Financial Services*, --- S.W.3d ---, 2008 WL 5454124 (Mo.
13 App. E.D. 2008). And as the Court noted above, even the *Carideo* case in which Defendants
14 heavily rely upon has recently been remanded by the Ninth Circuit. *See In re Carideo*, 550
15 F.3d 846 (9th Cir. 2008). This ruling is therefore consistent with the modern trend.

16 As a result, the Court finds that class waiver provisions in the instant case are
17 unconscionable. Defendants are effectively exculpated from any liability as a result of the
18 provisions contained in their WSAs. This conduct contravenes Washington's fundamental
19 public policy favoring the availability of class actions as a mechanism for enforcing a
20 consumer's rights.

21 Defendants indicate that if the class-action waiver provision is unenforceable, the entire
22 arbitration agreement should be unenforceable. Accordingly, the Court finds that all language
23 in the applicable WSAs touching upon arbitration is unenforceable under Washington law.

24 **E. Preemption**

25 Defendants nevertheless argue that the FAA preempts the substantive unconscionability
26 laws of Washington State. In support of this argument, Defendants indicate that § 2 of the
27 FAA mandates that arbitration provisions "shall be valid, irrevocable, and enforceable, save
28 upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §

2. Defendants argue that this section preempts general principles of contract law where those doctrines are employed in a way to subject arbitration clauses to special scrutiny. (Dkt. #133 at 53) (citing *Iberia Credit Bureau, Inc v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004)). In other words, courts “may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original).

However, the arguments raised by Defendants have been squarely rejected by the Ninth Circuit. For example, in *Shroyer v. New Cingular Wireless Servs., Inc.*, the court recognized that Congress never intended to place arbitration agreements on a different footing than other contracts. 498 F.3d 976, 989 (9th Cir. 2007); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967) (“As the ‘savings clause’ in § 2 indicates, the purpose of Congress . . . was to make arbitration agreements as enforceable as other contracts, but not more so.”). Nonetheless, the Court held that this purpose “does not appear to be frustrated or undermined in any way by a holding that class arbitration waivers in contracts of adhesion, like class action waivers in such contracts, are unconscionable.” *Shroyer*, 498 F.3d at 990. The court concluded “that applying California’s generally applicable contract law to refuse enforcement of the unconscionable class action waiver in this case *does not stand as an obstacle to the purposes or objectives of the [FAA]*.” *Id.* at 993 (emphasis added).

The Ninth Circuit subsequently upheld *Shroyer* in a case implicating Washington State’s law on substantive unconscionability. *See Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008). The court expressly held that “[j]ust as the FAA does not preempt California’s unconscionability law, *it does not preempt Washington’s unconscionability law.*” *Id.* at 1221 (emphasis added). The court based this finding on the concern that “when the potential for individual gain is small, few if any plaintiffs will pursue either individual arbitration *or* litigation, thereby greatly reducing the aggregate liability a company faces when it has exacted small sums from millions.” *Id.* (emphasis in original).

The same concerns raised in *Shroyer* and *Lowden* apply with equal force here. The Court is not extending or otherwise employing a unique rule of law in finding that the class-

1 action waiver provisions in this case are substantively unconscionable. In fact, the principles
2 utilized by the Court are general doctrines of unconscionability law that would apply to any
3 two parties to a contract. The fact that the individuals here are precluded from proceeding as
4 a class is not strictly limited to situations where such a provision is embedded in an arbitration
5 provision. Whenever a party is effectively exculpating itself from allegedly fraudulent
6 activity, general principles of unconscionability would potentially apply.

7 Defendants attempt to make one last plea to escape from the umbrella of these holdings
8 by arguing that a recent Supreme Court case supersedes *Shroyer* and *Lowden*. See *Preston v.*
9 *Ferrer*, 128 S.Ct. 978 (2008). This argument is not persuasive. In *Preston*, the Supreme
10 Court addressed the narrow issue of whether a state statute assigning primary jurisdiction to a
11 state labor commission is superseded by the FAA. *Id.* at 981. In holding that the statute was
12 indeed preempted by the FAA, the Court upheld the general principle in favor of arbitrating
13 disputes. *Preston* did not discuss or otherwise impact the more specific principle that
14 “generally applicable contract defenses such as fraud, duress, or unconscionability, may be
15 applied to invalidate arbitration agreements[.]” *Casarotto*, 517 U.S. at 687.

16 **III. CONCLUSION**

17 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
18 and the remainder of the record, and having considered the oral argument of the parties, the
19 Court hereby finds and ORDERS:

20 (1) “Defendants’ Amended Motion to Compel Arbitration Pursuant to the Federal
21 Arbitration Act and to Dismiss Action” (Dkt. #133) is DENIED. Defendants are directed to
22 file an answer to Plaintiffs’ second amended complaint no later than thirty (30) days from the
23 date of this Order. Once Defendants respond, the Court will issue its initial scheduling order.

24 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

25 DATED this 22nd day of May, 2009.

26 

27 RICARDO S. MARTINEZ
28 UNITED STATES DISTRICT JUDGE